11-1800-8098-1

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HUMAN SERVICES

In the Matter of the Proposed Adoption of Rules of the Department of Human Services Governing Case Management Services for Persons with Mental Retardation or Related Conditions (Minnesota Rules, Parts 9525.0004 to 9525.0036) and Technical Amendments to Other Department of Human Services Rules Governing Related Services.

REPORT OF THE ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge Phyllis Reha on September 7, 1993 at 9:00 a.m. in Room 10 of the State Office Building, 100 Constitution Avenue, St. Paul, Minnesota.

This Report is part of a rulemaking proceeding held pursuant to Minn. Stat. §§ 14.131 to 14.20 (1992) to hear public comment, determine whether the Minnesota Department of Human Services (hereinafter referred to as "DHS" or "the Department") has fulfilled all relevant substantive and procedural requirements of law applicable to the adoption of the rules, assess whether the proposed rules are needed and reasonable, and determine whether or not modifications to the rules proposed by the Department after initial publication are substantially different from those originally proposed.

David Iverson, Special Assistant Attorney General, 525 Park Street, Suite 500, St. Paul, Minnesota 55103, appeared on behalf of the Department. The Department's hearing panel consisted of Gerald Nord, Assistant Director of the Department's Division for Persons with Developmental Disabilities; Laura Plummer Zrust, Rules Coordinator with the Department's Rules Division; and Laura Doyle, Management Consultant at the Department's Division for Persons with Developmental Disabilities.

40 persons attended the hearing. 31 persons signed the hearing register. Many of the attendees gave testimony about these rules. The Department submitted changes to the proposed rules at the hearing. The Administrative Law Judge received 34 agency exhibits into evidence during the hearing. The hearing

continued until all interested persons, groups or associations had an opportunity to be heard concerning the adoption of these rules.

The record remained open for the submission of written comments until September 27, 1993, twenty calendar days following the date of the hearing. Pursuant to Minn. Stat. § 14.15, subd. 1 (1992), five working days were allowed for the filing of responsive comments. At the close of business on October 4, 1993, the rulemaking record closed for all purposes.

The Administrative Law Judge received several written comments from interested persons during the comment period. The Department submitted written comments responding to matters discussed at the hearing and comments filed during the twenty-day period. In its written comments, the Department proposed further amendments to the rules.

The agency must wait at least five days before taking any final action on the rules; during that period, this Report must be made available to all interested persons upon request.

Pursuant to the provisions of Minn. Stat. § 14.15, subd. 3 and 4, this Report has been submitted to the Chief Administrative Law Judge for his approval. If the Chief Administrative Law Judge approves the adverse findings of this Report, he will advise the agency of actions which will correct the defects and the agency may not adopt the rule until the Chief Administrative Law Judge determines that the defects have been corrected. However, in those instances where the Chief Administrative Law Judge identifies defects which relate to the issues of need or reasonableness, the agency may either adopt the Chief Administrative Law Judge's suggested actions to cure the defects or, in the alternative, if the agency does not elect to adopt the suggested actions, it must submit the proposed rule to the Legislative Commission to Review Administrative Rules for the Commission's advice and comment.

If the agency elects to adopt the suggested actions of the Chief Administrative Law Judge and makes no other changes and the Chief Administrative Law Judge determines that the defects have been corrected, then the agency may proceed to adopt the rule and submit it to the Revisor of Statutes for a review of the form. If the agency makes changes in the rule other than those suggested by the Administrative Law Judge and the Chief Administrative Law Judge, then it shall submit the rule, with the complete record, to the Chief Administrative Law Judge for a review of the changes before adopting it and submitting it to the Revisor of Statutes.

When the agency files the rule with the Secretary of State, it shall give notice on the day of filing to all persons who

requested that they be informed of the filing.

Based upon all the testimony, exhibits and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Procedural Requirements

On June 28, 1993, the Department filed the following documents with the Chief Administrative Law Judge:

(a) a copy of the proposed rules certified by the Revisor of Statutes (Exhibit 3);

(b) an estimate of the number of persons expected to attend the hearing and an estimate of the expected duration of the hearing;

(c) the Order for Hearing (Exhibit 7);

(d) the Notice of Hearing proposed to be issued;

(e) the Statement of Need and Reasonableness (hereinafter referred to as the "SONAR") (Exhibit 4);

(f) a statement that additional discretionary notice would be given; and

(g) a Fiscal Note (Exhibit 5).

On July 28, 1993, the Department mailed the Notice of Hearing to all persons and associations who had registered their names with the Department for the purpose of receiving such notice. The Department also sent additional discretionary notice to 87 county welfare departments and other interested persons

On August 2, 1993, a copy of the proposed rules and the Notice of Hearing was published at 18 State Register 431.

On August 11, 1993, the Department filed the following documents with the Administrative Law Judge:

(a) the Notice of Hearing as mailed (Exhibit 6);

(b) a copy of the State Register containing the Notice of Hearing and the proposed rules (Exhibit 8);

(c) a copy of the Notice of Solicitation of Outside Opinion published at 16 State Register 1410 (December 2, 1991), together with the materials

received in response to that notice (Exhibits 1 & 2);

(d) the Affidavit of Mailing the Notice to all persons on the Department's mailing list and to those persons receiving discretionary notice and the Agency's certification that its mailing list was accurate and complete (Exhibits 9-11); and

(e) the names of agency personnel and witnesses who would testify on behalf of the Department at the hearing (Exhibit 13).

Scope of the Record

As an initial matter, the Administrative Law Judge must determine the scope of the record in this rulemaking proceeding. Three submitted comments were arguably late. Arc Ramsey County submitted a comment to the Department on September 27, 1993 which was not forwarded to the Office of Administrative Hearings until October 4, 1993. Robert E. Johnson submitted a comment to the lobby receptionist of the building in which the Office of Administrative Hearings are located. The comment was not delivered to the Office of Administrative Hearings until September 28, 1993. Gray, Plant, Mooty, Mooty & Bennett submitted a responsive comment on October 5, 1993.

The Minnesota Administrative Procedure Act and rules describe filing requirements. The initial comment period shall not exceed 20 days. Minn. Stat. § 14.15, subd. 1 (1992). The Office of Administrative Hearings must receive comments no later than 4:30 p.m. on the last day for submission. Minn. R. 1400.0850 (1991 & Supp. 1992). Anyone may submit responsive comments within an additional five working days. Minn. Stat. § 14.15, subd. 1 (1992). The Office of Administrative Hearings must receive responses no later than 4:30 p.m. on the last working day for submission. Minn. R. 1400.0850 (1991 & Supp. 1992). A facsimile transmission is timely if transmission is commenced prior to 4:30 p.m. Minn. R. 1400.0250, subp. 2 (1991 & Supp. 1992). The hearing record closes upon the last day for receipt of written responses. Minn. R. 1400.0900 (1991 & Supp. 1992).

The statutes and rules specify the time and place for submission of comments. Comments must be submitted by 4:30 p.m. on the day specified at the hearing. In this proceeding, those days are September 27, 1993 for comments and October 4, 1993 for responses. The Office of Administrative Hearings must receive the comments by 4:30 p.m. on those days. The purpose of these filing requirements is to allow interested individuals and entities the opportunity to comment on this information.

The Administrative Law Judge hereby excludes the comments of Arc Ramsey County and Robert E. Johnson from the record. Other parties relied on the fact that the record closed on September 27, 1993 when making responsive comments. Neither of these comments was in the record by that date. Under the statute and rules, all parties must assume responsibility for proper filings.

The responsive comments of Gray, Plant, Mooty, Mooty & Bennett present a more difficult question. Arguably, Gray, Plant's failure to submit its responsive comments on time did not prejudice anyone. Gray, Plant argues that Minn. Stat. § 14.15, subd. 5, which authorizes the Administrative Law Judge to disregard harmless error by the agency, should apply to the public as well.

The Legislature added subdivision 5 in 1992. 1992 Minn. Laws ch. 494, § 4. In chapter 494, the Legislature addressed the issues of notice and harmless error. Four of Chapter 494's ten sections authorize various persons to disregard harmless error by an agency in rulemaking. See 1992 Minn. Laws ch. 494, §§ 2,4,6,8. None of the amendments authorize an administrative law judge to disregard harmless error by anyone other than the agency. The Legislature intended to ease the procedural burden imposed by rulemaking on agencies. The Legislature did not provide similar relief for the public because the public is not subject to as many procedural burdens as the agency. The public's only procedural burden is the filing requirement.

Further, no other statutes or rules authorize the Administrative Law Judge to disregard harmless error. If the clear filing requirements are obscured by a "harmless error" standard, the Administrative Law Judge faces an impossible task of determining which errors are and are not "harmless." A responsive comment submitted at any time before the Administrative Law Judge has submitted their report may be "harmless" because the Administrative Law Judge can always revise the report and no one has been prejudiced. The statute and rules, however, do not authorize this result.

The Administrative Law Judge hereby excludes the responsive comment of Gray, Plant, Mooty, Mooty & Bennett from the record. Accordingly, the Administrative Law Judge has not considered the comments of Arc Ramsey, Robert E. Johnson, and Gray, Plant, Mooty, Mooty & Bennett in the preparation of this report.

Statutory Authority

In the Statement of Need and Reasonableness, the Department relies on Minn. Stat. § 256B.092 as authority for the proposed rules.

That statutory provision expressly authorizes the Commissioner of the Department of Human Services (hereinafter "the Commissioner") to adopt rules governing the case management

of persons with mental retardation or related conditions:

> **Subd. 6. Rules.** The commissioner shall adopt emergency and permanent rules to establish required controls, documentation, and reporting of services provided in order to assure proper administration of the approved waiver plan, and to establish policy and procedures to reduce duplicative efforts and unnecessary paperwork on the part of case managers.

The Commissioner originally promulgated rules governing case management in 1986. These Rules are commonly referred to as "Rule 185." The Legislature rewrote Minn. Stat. § 256B.092 in 1991. The Department now proposes to rewrite and renumber these rules in order to incorporate statutory amendments, streamline the rule and the case management process, assure respect for persons and families in the case management process, and allow flexibility. The Administrative Law Judge concludes that the Department has general statutory authority to adopt the proposed rules.

Nature of the Proposed Rules

Case management is the process by which persons with mental retardation and related conditions gain access to necessary services. Case managers are county employees who oversee the services provided to these persons. This rule sets goals for the case management process and sets basic standards for case managers, establishes procedures for case management and duties of case managers, and sets guidelines for the Department for supervision and determinations of need.

Small Business Considerations in Rulemaking

Minn. Stat. § 14.115, subd. 2 (1992) requires state agencies proposing rules that may affect small businesses to consider methods for reducing adverse impact on those businesses. In its Notice of Hearing and SONAR, the Department indicated that it had considered the small business requirements in drafting the proposed rules. The Department asserted that these rules merely implement the statutory requirements of Minn. Stat. § 256B.092 and that it would be contrary to the objectives of that statute to adopt less stringent requirements for small businesses. In addition, the Department maintains that these rules are exempt from the small business requirements pursuant to Minn. Stat. § 14.115, subd. 7(2) (1992).

RESA, Inc. argued at the hearing and in written comments that the rules have an impact on small business because a county may have a monopoly on case management and service provision. Under Minn. Stat. § 115, subd. 7(2) (1992), a rule is exempt from the small business

requirement if the rule governs county

administration or state and federal programs and does not directly affect small business. The proposed rules govern county and state actions in the case management process. The Administrative Law Judge agrees with the Department that these rules are exempt under subdivision 7(2).

Fiscal Notice

Minn. Stat. § 14.11, subd. 1 (1992) requires agencies proposing rules that will require the expenditure of public funds in excess of $100,000 per year by local public bodies to publish an estimate of the total cost to local public bodies for the twoyear period immediately following adoption of the rules. In its fiscal note, the Department stated that the proposed rules will have no fiscal impact and will not affect either state or local spending the two fiscal years following their promulgation. DHS Exhibit 5 at 4. The Administrative Law Judge concludes that the Department has met the fiscal notice requirements of Minn. Stat. § 14.11, subd. 1.

Impact on Agricultural Land

Minn. Stat. § 14.11, subd. 2 (1992) requires that agencies proposing rules that have a "direct and substantial adverse impact on agricultural land in the state" comply with the requirements set forth in Minn. Stat. §§ 17.80 to 17.84 (1992). Because the proposed rules will not have an impact on agricultural land with the meaning of Minn. Stat. § 14.11, subd. 2 (1992), these provisions do not apply to this rulemaking proceeding.

Outside Information Solicited

In formulating these proposed rules, the Department published notices soliciting outside information on August 12, 1991 and December 2, 1991 and received responsive comments. Regional public meetings attended by more than 500 persons were held in April and May 1992 to obtain input from the public. In addition, these rules were discussed at meetings of an advisory committee held from October 1991 through July 1992. SONAR at 5.

Analysis of the Proposed Rules

The Administrative Law Judge must determine, inter alia, whether the need for and reasonableness of the proposed rules has been established by the Department by an affirmative presentation of fact. The Department prepared a Statement of Need and Reasonableness (hereinafter referred to as "SONAR") in support of the adoption of the proposed rules. At the hearing, the Department primarily relied upon its SONAR as its affirmative presentation of need and reasonableness. The

SONAR was supplemented by the comments made by the Department at the public

hearing and its written post-hearing comments.

The question of whether a rule is reasonable focuses on whether it has a rational basis. The Minnesota Court of Appeals has held a rule to be reasonable if it is rationally related to the end sought to be achieved by the statute. Broen Memorial Home v. Minnesota Dep't of Human Services, 364 N.W.2d 436, 440 (Minn. Ct. App. 1985); Blocker Outdoor Advertising Co. v. Minnesota Dep't of Transp., 347 N.W.2d 88, 91 (Minn. Ct. App. 1984). The Minnesota Supreme Court has further defined the burden by requiring that the agency "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken." Manufactured Housing Institute v. Pettersen, 347 N.W.2d 238, 244 (Minn. 1984).

This Report is generally limited to the discussion of the portions of the proposed rules that received significant critical comment or otherwise need to be examined. Because some sections of the proposed rules were not opposed and were adequately supported by the SONAR, a detailed discussion of each section of the proposed rules is unnecessary. The Administrative Law Judge specifically finds that the Department has demonstrated the need for and reasonableness of the provisions that are not discussed in this Report by an affirmative presentation of fact, that such provisions are specifically authorized by statute, and that there are no other problems that prevent their adoption.

Where changes are made to the rule after publication in the State Register, the Administrative Law Judge must determine if the new language is substantially different from that which was originally proposed. Minn. Stat. § 14.15, subd. 4 (1992). Minn. R. 1400.1100 (1991) sets forth the standards which are applied in order to determine whether the new language is substantially different from the rules as originally proposed. Any changes proposed by the Department from the rules as published in the State Register which is not discussed in this Report is found not to constitute a substantial change.

Proposed Rule 9525.0004 - Definitions

Proposed rule 9525.0004 amends and replaces a number of existing definitions. Only the definitions which received significant critical comment will be discussed.

Subpart 2 - Advocate

In this subpart, the Department seeks to amend the definition of advocate. While an advocate has no formal role in the case management

rule, the advocate speaks on behalf of the person. Often, the advocate has more experience with case management than the person and helps the person understand the case management system. The advocate, therefore, is important to

help the person obtain needed services. The central issue in this subpart is the language which would exclude anyone with a direct or indirect financial interest in the provision of services from the definition of advocate.

The presence of this issue in this rulemaking proceeding raises concern about the Department's motives. The Department proposed the same change in the definition of advocate in a recent rulemaking proceeding. See Report of Administrative Law Judge Barbara L. Neilson, In the Matter of the Proposed Adoption of Amendments to the Rules of the Department of Human Services Governing the Use of Aversive and Deprivation Procedures By Licensed Facilities Serving Persons with Mental Retardation or Related Conditions (Minnesota Rules, Parts 9525.2700 and 9525.2810), June 11, 1993. In that proceeding, Administrative Law Judge Neilson found that the rule was neither statutorily authorized nor needed and reasonable in the aversive and deprivation context. Just over two weeks later, the Department gave notice that it would propose the same change in this rulemaking proceeding.

Because the prior proceeding covered aversive and deprivation procedures and this proceeding covers case management, the two definitions are technically separate and distinct. The Department contends that, even if the advocate definition was not statutorily authorized in the aversive and deprivation rule, the definition is statutorily authorized in the case management rule. Further, the Department contends that it has shown need and reasonableness in the present proceeding.

Even if the Department is correct, its approach in this proceeding is troubling. The proposed definition was one of the most controversial issues in the prior proceeding. Similarly, the proposed change is one of the most controversial issues in this proceeding. 9 out of 11 speakers at the hearing discussed this definition. 29 out of 33 written comments and responsive comments addressed this definition. Several speakers expressed dismay that the advocate definition was again in controversy.

The purposes of the Minnesota Administrative Procedure Act, the procedural requirements, and the Administrative Law Judge report are to allow public input and to ensure public confidence in the rulemaking process. Regardless of the Department's motives and the distinctions between the two rules, the Department's failure to conclude the prior rulemaking process before proposing this rule allows the inference that the Department is acting in bad faith. The public may conclude that the Department is forum-shopping, seeking a second opinion in order to disregard a report with which the Department disagrees, and that the Department will proceed with its proposed definition in the prior

rulemaking proceeding if it is successful. Even if the Department has acted entirely in good faith, its actions

create an appearance of bad faith. This undermines the purposes of the rulemaking process.

Because the Department has presented new statutory and factual arguments, however, the Administrative Law Judge considers whether the Department has established statutory authority and need and reasonableness for the advocate definition in the case management rule.

Gray, Plant, Mooty, Mooty & Bennett argues that the language "direct or indirect financial interest" is vague and, therefore, unconstitutional. A rule must be sufficiently specific to provide fair warning of the type of conduct to which the rule applies. Cullen v. Kentucky, 407 U.S. 104, 110 (1972); Thompson v. City of Minneapolis, 300 N.W.2d 763, 768 (Minn. 1980). The language "direct or indirect financial interest" applies to anyone who is paid by a service provider or otherwise has a financial interest in the provision of services. The rule provides a fair warning that certain types of employment or financial relationships may exclude an individual from the definition of advocate.

Barbara Jordano and Gray, Plant, Mooty, Mooty & Bennett argue that the advocate definition is an unconstitutional prior restraint on speech because it limits the individuals who may speak on behalf of a person. The definition does not limit an individual's right to speak. The definition limits the circumstances in which an individual will be recognized as speaking on behalf of a person. The rule limits the weight which will be given to a person's speech, not their right to speak.

Gray, Plant, Mooty, Mooty & Bennett argue that the definition of advocate is inconsistent with state and federal statutes. Gray, Plant cites several statutes and regulations in support of its argument. The Minnesota Patient Bill of Rights is the only statute which may apply to this situation.

The Minnesota Patient Bill of Rights provides that a patient or resident has a right to any available advocacy service. Minn. Stat. § 144.651, subd. 30 (1992). The Legislature enacted the Patient Bill of Rights in 1973. 1973 Minn. Laws ch. 688, § 1. The Legislature added the right to advocacy in 1986. 1986 Minn. Laws ch. 326, § 4.

The Patient Bill of Rights applies to anyone who is a "patient" or a "resident." Minn. Stat. § 144.651, subd. 2 (1992). Subdivision 2 contains four definitions. Under the first, third, and fourth definitions, an individual becomes a "patient" or "resident" upon admission to a treatment facility. Minn. Stat. § 144.651, subd. 2 (1992). Under these definitions, a person in the case management process is not a "patient" or "resident." Under the second definition, an

individual becomes a

"patient" when they receive mental health treatment. Minn. Stat. § 144.651, subd. 2 (1992). The Legislature added this definition in 1986. 1986 Minn. Laws ch. 326, § 1.

The 1986 amendments arose out of the work of the Governor's Mental Health Commission. The legislative record for S.F. 1919, which became chapter 326, contains the commission's report, Mandate for Action, Recommendations of the Governor's Mental Health Commission, February 3, 1986. Chapter 326 contained amendments proposed by the Commission. The Commission addressed mental illness, rather than mental retardation or related conditions. Mandate for Action, Recommendations of the Governor's Mental Health Commission, February 3, 1986 at 2-4.

Based on this legislative history, the Administrative Law Judge concludes that the Legislature did not intend the second definition of Minn. Stat. § 144.651, subd. 2 to apply to case management for persons with mental retardation or related conditions. The Department has statutory authority to adopt the proposed definition.

The Department states that the advocate definition is needed and reasonable because a potential conflict of interest exists when an advocate has a financial interest in the provision of services. SONAR at 7. As DHS points out in its SONAR and other comments, a potential conflict of interest exists anytime that an advocate has a direct or indirect interest in the provision of services to a person. An advocate, by definition, should "advocate" for the best interests of the person. The best interests of the person will not always be compatible with the best interests of a provider. A provider-affiliated advocate may have to choose between the best interests of the person and the provider. There is no guarantee that the advocate will favor the best interests of the person.

Standing alone, however, the Department's concern is insufficient to demonstrate need and reasonableness. The case management process is a complex process. The Department states that case management is the cornerstone of all services. SONAR at 3. An advocate provides a valuable service by assisting persons to obtain the proper case management services. The Department, Anne Henry of Legal Advocacy for Persons with Developmental Disabilities, Advocating Change Together, and REM agree that there are not enough independent advocates to assist all persons. Given the lack of independent advocates, a definition which eliminates provider-affiliated advocates will often result in no advocate being available for a person. An unsubstantiated threat of conflicts of interest is insufficient to completely eliminate provider-affiliated advocates.

In order to demonstrate that the elimination of all provider-affiliated advocates is needed and reasonableness, the

Department must show that provider-affiliated advocates are acting against the best interests of the persons. Because of the lack of comprehensive statistical data, this showing rests on the examples presented at the hearing and in the comments.

At the hearing, the Department cited six examples of alleged conflicts on interest. Transcript at 33-39. Mary Barstad, a program manager at the Developmental Disabilities Division of the Hennepin County Community Services Department testified that at least incidents of alleged conflicts of interest existed in Hennepin County and cited two specific examples of alleged conflicts on interest. Transcript at 149-152, 163-169. Alison Subialka, a case manager for Anoka County, testified to one incident of an alleged conflict of interest. Transcript at 214- 220. James Campbell, a social service provider for Mower County testified to three incidents of alleged conflicts of interest. Transcript at 223-226.

In a written comment, Dennis McCoy, Deputy Administrator of Blue Earth County Human Services, cited one incident of an alleged conflict of interest. Kevin Van Hooser, Social Services Supervisor for Isanti County Family Services and Welfare Department, cited two examples of alleged conflicts of interest. Tim Jeffrey, Social Service Supervisor for Stearns County Social Services, cited two incidents of alleged conflicts of interest.

Gregory Merz of Gray, Plant, Mooty, Mooty & Bennett, Mary Rodenberg-Roberts of REM, and Sharon Todoroff testified at the hearing that some or all of the above-mentioned incidents did not involve actual conflicts of interest. In written comments, Barbara Southworth and Jane Colapietro each cited one instance of a provider-affiliated advocate which they claimed involved no conflict of interest. Mary Martin of Gray, Plant, Mooty, Mooty & Bennett submitted extensive written comments alleging that many of the cited incidents did not involve conflicts of interest.

Because of the shroud of anonymity, it is unclear whether multiple parties are citing the same or different examples. The various examples demonstrate a high level of distrust and lack of cooperation between county case managers and provider-affiliated advocates. In only three examples, however, has the agency demonstrated that a provider-affiliated advocate has acted against the best interests of the person. These examples are DHS' example #3 (provider-affiliated advocate assisted a person's parents in their attempts to restrict the person's choice of living arrangements), DHS' example #4 (provider-affiliated advocate allegedly refused to consider services provided by other facilities), and Blue Earth County's example (provider-affiliated advocate refused to honor person's preference of living arrangements).

The other examples show conflicts between county case

managers, providers, and provider-affiliated advocates. They also indicate that provider-affiliated advocates have occasionally assisted individuals other than the person. In these examples, however, the Department has not explained how the conflicts or assistance to others show that the provideraffiliated advocate has acted against the best interests of the person. The Department must explain conflicts and ambiguities in the evidence.
Manufactured Housing Institute v. Pettersen, 347 N.W.2d 238, 246 (Minn. 1984). The Department has failed to provide this explanation.

Further, the Department testified that the definition will affect only one or two advocates. Transcript at 181. The small number of advocates who fall within this rule undercuts the Department's argument that a serious conflict of interest problem exists.

A rule cannot be so broad that it encompasses the innocent in order to ensure punishment of the guilty. Bunger v. Iowa H.S. Athletic Ass'n, 197 N.W.2d 555, 565 (Iowa 1972). A rule must be rationally related to the end which is sought.
Broen Memorial Home v. Minnesota Dep't of Human Services, 364 N.W.2d 436, 440 (Minn. Ct. App. 1985). The Department's proposed advocate definition would eliminate a potential for harm. It would also eliminate a few demonstrated examples of harm. The proposed definition, however, would eliminate needed advocacy services which are presently available. The definition also would eliminate an unknown number of future advocates.

The three examples in which providers have acted against the best interests of the person are insufficient to establish that an advocate definition which creates this result is either needed or reasonable. The Administrative Law Judge finds that the proposed definition is neither needed nor reasonable.

Gray, Plant, Mooty, Mooty & Bennett argued that the Administrative Law Judge should recommend the curative language proposed in the aversive and deprivation rule proceeding. The Department responded that even this language was inadequate because the recommended language merely provided that a person and the person's legal representative should be informed of the conflict. The Administrative Law Judge recommends that Department replace the last sentence in proposed subpart 2 with the following language:

> Where an advocate or an advocate's employer has a direct or indirect financial interest in providing services or supports that the advocate is suggesting that the person receive, the advocate must fully disclose the nature of the relationship and financial interest to the person and the person's legal representative. In order to advocate such services or supports, the advocate must obtain informed

consent to the advocate's recommendations.

This language addresses the Department's concerns over potential conflicts of interest. The language follows procedures currently used by provider-affiliated advocates. The language also is similar to other rule provisions, such as proposed rule 9525.0012, subp. 4, which allow a potential conflict of interest with appropriate safeguards. The consent procedure uses the definition of informed consent in proposed rule 9525.0004, subp. 13. Lastly, this language protects the availability of advocates. This language is needed and reasonable and is not a substantial change from the rules as originally proposed.

Because the recommended language, similar to the second sentence of proposed rule 9525.0004, subp. 2, is a rule rather than a definition, the Administrative Law Judge suggests that the Department relocate the recommended language in proposed rules 9525.0008 to 9525.0036 or a new rule part. This relocation would improve the clarity of the rule and would not be a substantial change.

Subpart 13 - Informed Choice

This subpart defines when informed choice exists. Blue Earth County Human Services, MACSSA, and Hennepin County Bureau of Human Services expressed concern that the definition does not address a person's capacity to make an informed choice. This definition provides that an informed choice exists when (1) a person or their legal representative makes a voluntary decision, (2) the decision-maker is familiar with the alternatives, and (3) the alternatives listed in A, B, and C have been explained to the decision-maker. Capacity is implicit in the second element of this definition. If a person is incompetent, they cannot become familiar with the alternatives which are available. In such a case, there must a guardian or conservator to make an informed choice on behalf of the person. See DHS Response, September 27, 1993, at 13.

Hennepin County Bureau of Social Services and Anoka County Human Services Division suggested that the Department draft a brochure explaining the available choices. While such a brochure may be useful, it does not affect the reasonableness of this subpart. The proposed subpart is needed and reasonable.

Subpart 16 - Least restrictive environment

One of the goals of the case management rule is to provide the person with the least restrictive environment. This subpart defines the "least restrictive environment." Blue Earth County Human Services, MACSSA, and Hennepin County Bureau of Human Services suggested that the

Department change "typical patterns of living" to "socially acceptable patterns of living."

The Department stated that the word "typical" is less subjective and judgmental than the term "socially acceptable." DHS Response, September 27, 1993, at 15. The Administrative Law Judge agrees with the Department that use of the term "socially acceptable" would create a serious as to the standards which DHS was using to judge social acceptability. The use of "typical patterns of living" is more controlled and is reasonable.

Arc Minnesota, Anne Henry of Legal Advocacy for Persons with Developmental Disabilities, Advocating Change Together also suggested an amendment to the definition. The stated purpose of this amendment was to make the rule more positive. The Department agreed to this amendment and proposed the following revised definition:

> **Subp. 16. Least restrictive environment.** "Least restrictive environment" means an environment where services:
> A. are delivered with minimum limitation, intrusion, disruption, or departure from typical patterns of living available to persons without disabilities;
> B. do not subject the person or others to unnecessary risks to health and safety; and
> C. maximize the person's level of independence, productivity and inclusion in the community.

Item C is the Department's modification. The Administrative Law Judge concludes that this is not a substantial modification and that the definition as a whole in needed and reasonable.

Subpart 18 - Overriding health care needs

Hennepin County Bureau of Human Services commented that it is unclear who decides that an overriding health care need exists. The statutory language regarding overriding health care needs is:

> For persons determined to have overriding health care needs and are seeking admission to a nursing facility or an ICF/MR, or seeking access to homeand community-based waivered services, a registered nurse must be designated as either the case manager or the qualified mental retardation professional.

Minn. Stat. § 256B.092, subd. 7 (1992) as amended by 1993 Minn. Laws ch. 339, § 18. The statute does not state who makes the determination that an overriding health care needs exists. The statute also does not define what is an overriding health care need. This definition limits the Department's discretion by defining an "overriding health care need." The definition is not unneeded or unreasonable because it does not address another statutory problem. The proposed subpart is needed and reasonable.

Subpart 26 - "Screening team" or service planning team

This subpart defines the members of the screening team. Marcia Bryan of ARRM commented that a screening team could consist of only two persons because one individual can fulfill multiple role. The Departments's definition incorporates the statutory definition in Minn. Stat. § 256B.092, subd. 7 (1992). While ARRM points out a real problem, the statute, not the Department's rule, creates this problem. This definition is needed and reasonable.

Proposed Rule 9525.0008 - Applicability and Purpose

Proposed rule 9525.0008 sets goals for the case management process. Only the subparts which received significant critical comment will be discussed.

Subpart 2 - Purpose

This subpart sets out the general purposes of the case management rule. Blue Earth County Human Services, MACSSA, and Hennepin County Bureau of Human Services questioned the use of the phrase "result in the following outcomes." They objected that this phrase imposed an absolute duty to achieve the stated outcomes. The Department stated that these outcomes were general purposes of the rule and modified the language to "are designed to result in the following outcomes." DHS Response, September 27, 1993, at 22. This modification clarifies that compliance with the rule's purposes is judged by good-faith efforts. This modification is not a substantial change.

Blue Earth County Human Services, MACSSA, and Hennepin County Bureau of Human Services also questioned the use of "costeffective" as a purpose for case management services and supports. They contended that the term was too vague and the standards by which cost-effectiveness was to be measured were unclear. The term "cost-effective," in other contexts, may allow the Department too much discretion. In this rule, however, the cost-effective standard is further defined in the specific provisions in which it applies. See proposed rule 9525.0024, subps. 3(D-F) (cost-effective criteria in individual service plan development), proposed rule 9525.0024, subps. 5(A-D) (costeffective criteria in identification of service options and providers), proposed rule 9525.0024, subp. 6 (assisting the person to access services), and proposed rule 9525.0036, subp. 2 (duties of commissioner for determination of need). The Administrative Law Judge concludes that these provisions are sufficient to control the Department's discretion in

applying the cost-effective standard. This subpart is needed and reasonable.

Subpart 3 - Goals

This subpart establishes goals for the case management process. One of the purposes of the case management rule under proposed subpart 2 is the achievement of these goals. Blue Earth County Human Services, MACSSA, and Hennepin County Bureau of Human Services suggested that the word "goals" be replaced with "practice principles." Anne Henry and the Governor's Planning Council on Developmental Disabilities expressed concerns that the goals were not sufficient to have an impact on case management.

As discussed above in connection with proposed rule 9525.0008, subp. 2, the goals contained in this subpart are not mandatory. The goals are more properly termed objectives which the case management system should strive to achieve. The goals provide sufficient criteria by which to determine whether a case management system is designed to achieve the stated goals. This subpart is needed and reasonable.

Hennepin County Bureau of Human Services suggested that family be defined to include non-traditional families. The Department declined to make this change. The rule is needed and reasonable as proposed.

Proposed rule 9525.0012 - County Board Case Management Responsibilities

Proposed rule 9525.0012 establishes the general responsibilities of the county in administering case management. Only the subparts which received significant critical comment will be discussed.

Subpart 3 - Purchase of case management

This subpart prevents a county from purchasing case management services from a provider with a direct or indirect financial interest in the provision of services. The Department states that it is necessary to prevent the purchase of case management services from a provider who has a direct or indirect financial interest in the provision of services to that person in order to prevent a conflict of interest. SONAR at 41-42. In response, Mary Martin of Gray, Plant, Mooty, Mooty & Bennett argues that this is unreasonable because it eliminates provideraffiliated case management while allowing the county to be both the provider and case manager. See proposed rule 9525.0012, subp. 4. Gray, Plant further argues that this restriction is inconsistent with federal free choice regulations.

A case manager must serve on the screening team. Minn. Stat. § 256B.092, subd. 7 (1992). No member of the screening team can have any direct or indirect service provider interest in the case. Minn. Stat. § 256B.092, subd. 7 (1992). Therefore, by implication, a county cannot

purchase case management services

from a provider with a direct or indirect financial interest in the provision of services. If the county did so, it would hire a case manager who would violate Minn. Stat. § 256B.092, subd. 7. This subpart implements the legislative command of subdivision 7. Even if the Minnesota Legislature has violate federal regulations, the Department cannot choose to favor federal regulations over the statutes enacted by the Legislature.

This subpart is not unreasonable because it eliminates provider-affiliated case management while allowing the county to be both the provider and case manager for the reasons discussed in connection with proposed rule 9525.0012, subp. 4. This subpart is needed and reasonable.

Subpart 4 - County request to provide case management and other services

This rule provides counties with a procedure whereby they may function as both case manager and provider. RESA, ARRM, Sheryl Larson, Arc Minnesota, Anne Henry, and the Governor's Planning Council on Developmental Disabilities opposed the county's ability to fulfill a dual role as case manager and service provider. The Department states that currently nine county-operated providers exist in eight separate counties. DHS Response, September 27, 1993 at 27. The Department recognizes that a potential conflict of interest exists and proposes this subpart as a means of preventing a conflict of interest while still ensuring that needed case management and provider services exist.

The Legislature requires that a case manager must not have a direct or indirect service provider interest in a case. Minn. Stat. § 256B.092, subd. 7 (1992). The Legislature did not define when a direct or interest service provider interest exists. The proposed subpart requires a county to demonstrate that it has built a wall between its case management and provider functions. This separation is sufficient to ensure that a direct or interest service provider interest does not exist. This subpart is needed and reasonable.

Subpart 5 - Procedures governing minimum standards for case management

This subpart requires counties to establish and monitor written case management policies. Blue Earth County Human Services, MACSSA, and Hennepin County Bureau of Human Services suggested that this subpart be amended to reflect that 9525.0008 embodied "principles" rather than "goals." For the reasons stated above in connection with proposed rule 9525.0008, subp. 3, the Administrative Law Judge finds that the use of the word "goals" is needed and reasonable.

Blue Earth County Human Services, MACSSA, and Hennepin County Bureau of Human Services argued that the requirement that counties establish and monitor written policies and procedures was unreasonable. The Legislature specifically authorized the Commissioner to "establish required controls, documentation, and reporting of services provided." Minn. Stat. § 256B.092, subd. 6 (1992). The requirement that counties monitor their written policies and procedures is needed and reasonable to control and document case management services.

ARRM suggested that the Department add language to this subpart clarifying that copies of policies and procedures are available to the public upon request and requiring an assessment of client, family and provider satisfaction in case management services evaluations. This subpart is reasonable without either addition. Since testimony and comments indicate dissatisfaction, an evaluation of satisfaction with case managers may be desirable. A rule is not unreasonable, however, simply because a more reasonable alternative exists. Federal Security Administrator v. Quaker Oats Co., 318 U.S. 218, 233 (1943). The Administrative Law Judge finds that this subpart is needed and reasonable.

Subpart 6 - Case manager qualifications and training

This subpart establishes education and training requirements for case managers and case manager aides. Blue Earth County Human Services, MACSSA, and Hennepin County Bureau of Human Services suggested that the requirement of 40 hours training for case manager aides be relaxed to allow on-the-job training. ARRM argued that even 40 hours of training was inadequate for many duties of case manager aides. Stearns County Social Services suggested that the requirement of one year experience for case managers be relaxed to allow certain persons to work under the supervision of a more experienced employee. The Department stressed the need for a certain level of qualifications for case managers and case manager aides. SONAR at 43-44. The Administrative Law Judge finds that this subpart is needed and reasonable to establish qualifications for case managers and case manager aides.

Subpart 8 - Termination of case management duties

This subpart describes when a case manager may terminate their relationship with a person. RESA suggested that a person should be able to terminate a case manager. This subpart limits the case manager's ability to terminate the relationship. The subpart does not address the right of the person to terminate the case manager. The Administrative Law Judge believes that a person with an irreconcilable difference with a case manager can resort to the conciliation and appeals provision,

proposed rule 9525.0016, subp. 14, to obtain relief.

Hennepin County Bureau of Human Services and Anoka County Human Services Division suggested that a case manager should be able to terminate an uncooperative person. The Department responded that it is important to attempt to engage in case management. DHS Response, September 27, 1993 at 34. The Department's position is reasonable. This subpart is needed and reasonable.

Proposed rule 9525.0016 - Case management administration

Proposed rule 9525.0016 establishes the procedures to be followed in case management administration. Only the subparts which received significant critical comment will be discussed.

Subpart 2 - Diagnostic definitions

This subpart has been reformatted since its original publication. The subpart is crucial to the operation of the case management process because an individual must have mental retardation or a related condition to qualify for case management services. The subpart as proposed and modified describes the diagnoses for mental retardation and related conditions.

Item B incorporates a 70 IQ, with allowance for errors, as a ceiling for mental retardation. Winona County Human Services, Blue Earth County Human Services, MACSSA, Hennepin County Bureau of Human Services, and Anoka County Human Services Division supported the use of the 70 IQ as a clear benchmark. Arc Suburban, Clayton Hosch, Arc Minnesota, Anne Henry, Advocating Change Together, Cheryl Peterson, Arc of Hennepin County, and the Governor's Planning Council on Developmental Disabilities opposed the use of the 70 IQ, arguing that it would be used as an arbitrary cut-off and is inconsistent with professional practice.

The Department stated that the modern trend is toward establishing a 70 IQ as a cut-off level. SONAR at 47. In the SONAR and at the hearing, the Department stated that errors of measurement should be considered to provide some flexibility. The critics responded that counties, in practice, will not use the errors of measurement. Given the testimony by several counties in favor of the 70 IQ on the basis that it provides a clear guideline, the criticism seems accurate.

Assuming that the 70 IQ does in fact become a cut-off, this standard is still needed and reasonable. The Department has shown that the 70 IQ level is used by professionals. The fact that general professional practice may favor the use of another IQ level does not make the Department's standard unreasonable. Further, the arbitrary effect of the

70 IQ level is lessened by the fact that counties should consider errors and the fact that

an individual with an IQ slightly higher than 70 can still be diagnosed with a related condition. The 70 IQ standard is needed and reasonable.

Anne Henry, Arc of Hennepin County, and the Governor's Planning Council on Developmental Disabilities expressed concern that this subpart did not adequately address related conditions. The Department modified its rule to include a definition of related conditions. Anne Henry and the Department disagree over the proper format of that definition. This disagreement focuses on the proper interpretation of proposed rule 9525.0016, subp. 2(A)(1).

The language in this item is taken directly from Minn. Stat. § 252.27 (1992). Anne Henry states that she and the Department are currently involved in two appeals over the proper interpretation of this language. The statutory language clearly presents a problem of interpretation. The Department promulgated a checklist to address confusion over the proper interpretation of this language. DHS Response, September 27, 1993 at 46-47. Anne Henry takes a different view as to the proper interpretation.

This issue is properly raised in appeals regarding application of the rule. The rule restates the statutory language in the same format as the statute. The rule is not unreasonable because it uses the exact language and format as the statute. Obviously, the Department's checklist may be an incorrect application of the statute and this rule. The Administrative Law Judge expresses no opinion as to the correctness of the interpretations advanced by Anne Henry and the Department in this regard. The proposed language is needed and reasonable. The Department's modification is not a substantial change.

The definition of "substantial functional limitations" in Item C replaces an extensive list of criteria in existing rule 9525.0190. The Department modified the definition of "substantial functional limitations" to state that this is a "long-term inability to significantly perform an activity or task." DHS Response, September 27, 1993 at 47-48. Anne Henry objected that the term "significantly" is vague.

While the term "significantly" is vague, it is limited to the narrow question of whether an individual can perform a task. In this narrow context, the term "significantly" provides a sufficient standard by which to determine whether an individual has a long-term inability to perform a task. Further, the definition of mental retardation uses the "deficits in adaptive behavior" and "significantly subaverage intellectual functioning" to demonstrate whether there is a "substantial functional limitation." The term "significantly" is sufficiently clear and

this item is needed and reasonable.

In reformatting this subpart, the Department appeared to be motivated by a desire to make the "person" definitions and the diagnostic definitions clear. The Administrative Law Judge recommends the following format changes to improve the clarity of this rule. The following language changes the format only and does not affect the substance of these provisions.

The terms "person," "person with a related condition," and "person with mental retardation" are important to the overall scheme of this rule. As such, the Administrative Law Judge recommends that the definitions be contained in proposed rule 9525.0004, the definitional rule. In order to address the drafting problem in applying these definitions, the Administrative Law Judge recommends that the following language be used:

> **Subp. 19. Person.** "Person" means a person with mental retardation, a person with a related condition, or a child under the age of five who has been determined to be eligible for case management under parts 9525.0004 to 9525.0036.
>
> **Subp. 20. Person with a related condition.** "Person with a related condition" means a person who has been diagnosed under part 9525.0016 as having a related condition.
>
> **Subp. 21. Person with mental retardation.** "Person with mental retardation" means a person who has been diagnosed under part 9525.0016 as having mental retardation and who manifests mental retardation before the person's 22nd birthday.

This definition of person references proposed rule 9525.0004, subps. 20 & 21 and proposed rule 9525.0016, subp. 3. These definitions of person with a related condition and person with mental retardation reference proposed rule 9525.0016, subp. 2. As described below, this language separates the definitional functions of subparts 19-21 from the diagnostic function of proposed rule 9525.0016, subp. 2.

Subpart 2, despite its proposed title, is designed to identify when a diagnosis of mental retardation exists. Because this diagnosis is phrased in terms of a definition, the rule as proposed is awkward. The Administrative Law Judge suggests that the title of this subpart be changed and that the following language be used:

> **Subp. 2. Diagnosis of mental retardation or a related condition.**
>
> A. An individual has mental retardation if the

individual has substantial functional limitations, manifested by significantly subaverage intellectual functioning and demonstrated deficits in adaptive behavior.

B. An individual has a related condition if the individual has a severe, chronic disability that meets all of the following conditions:

(1) is attributable to cerebral palsy, epilepsy, autism, Prader-Willi syndrome, or any other condition, other than mental illness as defined under Minnesota Statutes, section 345.462, subdivision 20, or an emotional disturbance, as defined under Minnesota Statutes, section 245.4871, subdivision 15, found to be closely related to mental retardation because the condition results in impairment of general intellectual functioning or adaptive behavior similar to that of persons with mental retardation and requires treatment or services similar to those required for persons with mental retardation;

(2) is manifested before the person reaches 22 years of age;

(3) is likely to continue indefinitely; and

(4) results in substantial functional limitations in three or more of the following areas of major life activity:

(a) self-case,

(b) understanding and use of language,

(c) learning,

(d) mobility,

(e) self-direction,

(f) capacity for independent living.

C. For purposes of this subpart and subpart 3, the following terms have the meaning given them.

(1) "Deficits in adaptive behavior" means a significant limitation in an individual's effectiveness in meeting the standards of maturation, learning, personal independence, and social responsibility expected for the individual's age level and cultural group, as determined by clinical assessment and, generally standardized scales.

(2) "Significantly subaverage intellectual functioning" means a full scale IQ score of 70 or less based on assessment that includes one or more individually administered standardized intelligence tests developed for the purpose of

assessing intellectual functioning. Errors of measurement must be considered according to subpart 5.

(3) "Substantial functional limitations" means the long-term inability to significantly perform an activity or task.

This language revises subpart 2 so that subpart 2 describes the conditions under which a case manager should make a diagnosis of mental retardation or a related condition under subpart 3. Item A is the diagnostic language contained in proposed Item B with a slight revision to include the defined term "substantial functional limitations." Item B is the diagnostic language contained in proposed Item A. Item C is the exact definitions currently in proposed Items C-E.

The Administrative Law Judge finds that this subpart is needed and reasonable. The Administrative Law Judge recommends, however, that the Department revise its definitions and this subpart as described above to improve the clarity of this section.

Subpart 3 - Diagnostic requirements to determine eligibility for case management

This subpart establishes the procedure which the county must use in making a diagnosis. Blue Earth County Human Services, MACSSA, Hennepin County Bureau of Human Services, Stearns County Social Services commented that the 35 working day time limit for a diagnostic evaluation was too short. Anne Henry, Arc of Hennepin County, and the Governor's Planning Council on Developmental Disabilities supported the Department's time limit. The Department's 35 working day time limit is needed and reasonable.

Subpart 4 - Administration of tests of intellectual functioning and assessments of adaptive behavior

This subpart governs the administration of standardized tests. Blue Earth County Human Services, MACSSA, and Hennepin County Bureau of Human Services suggested that the provisions requiring cultural sensitivity in standardized testing also be incorporated into the rules governing the professionals who administer these tests. This issue is beyond the scope of this rulemaking proceeding.

Anne Henry of Legal Advocacy for Persons with Developmental Disabilities commented that standardized tests are not useful in related condition cases and that the rules provide little control on the discretion of counties when a diagnosis or non-diagnosis of a related condition is made. In response, the

Department stated that proposed rule 9525.0016, subpart 3 provides guidelines for case managers to use when making these diagnoses. Subpart 3 requires that a comprehensive diagnostic evaluation contain several items in addition to standardized tests. The Administrative Law Judge agrees with the Department that these items control the discretion of case managers. This subpart is needed and reasonable.

Subpart 11 - Criteria for Service Authorization

This subpart establishes the criteria which the case manager must use in authorizing services. Blue Earth County Human Services, MACSSA, and Hennepin County Bureau of Human Services reiterated their concern regarding use of the words "available" and "cost-effective." For the reasons stated in connection with proposed rule 9525.0008, subp. 2, this subpart is needed and reasonable.

Subpart 14 - Conciliation and appeals

This subpart establishes the conciliation and appeals process to be used by a dissatisfied person or their legal representative. Arc Minnesota, Anne Henry, Arc of Hennepin County, the Governor's Planning Council on Developmental Disabilities suggested that the rule be amended to state that other persons may participate in the conciliation conference if the person or their legal representative so requests. In response to these concerns, the Department modified the proposed rule to include the suggested language. This modification is not a substantial change and the rule is needed and reasonable.

Gray, Plant, Mooty, Mooty & Bennett suggested that the rule be amended to clarify that an advocate will be notified of a conciliation conference. Gray, Plant, Mooty, Mooty & Bennett, Anne Henry, Arc of Hennepin County, the Governor's Planning Council on Developmental Disabilities suggested that the rule be amended to clarify that an advocate can commence an appeal. The Department stated at the hearing that both requested clarifications reflected correct interpretations of the operation of the rule. Transcript at 198-99. The Department, however, declined to make either modification. While these changes may be reasonable to clarify the operation of the rule, the rule is needed and reasonable without these changes.

Proposed rule 9525.0024 - Case Management Service Practice Standards

Proposed rule 9525.0024 establishes the duties of a case manager. Only the subpart which received significant critical comment will be discussed.

Subpart 8 - Monitoring and evaluation activities

This subpart describes the case manager's role in monitoring and evaluating the services provided to a person. The existing rule requires case managers to engage in several specific monitoring activities including visiting the person. Minn. R. 9525.0115, subp. 1 (1991 & Supp. 1992). The rule further requires that monitoring, including a visit, must take place at least twice a year. Minn. R. 9525.0015, subp. 1 (1991 & SUpp. 1992). The rule specifies those areas which a case manager should investigate while monitoring. Minn. R. 9525.0125, subp. 1 (1991 & Supp. 1992).

The proposed rule imposes no specific monitoring procedures. Proposed rule 9525.0024, subp. 8. The proposed rule allows case managers the discretion to specify monitoring and evaluation activities in an individual service plan. Proposed rule 9525.0024, subp. 8. The proposed rule states the issues which a case manager must address when monitoring does occur. Proposed rule 9525.0024, subp. 8.

In the SONAR, the Department provided no reasons for its change in the monitoring scheme. Arc Suburban, Arc Minnesota, Advocating Change Together, Cheryl Peterson, Arc of Hennepin County, the Governor's Planning Council on Developmental Disabilities, and Anne Henry suggested that there be at least semi-annual meetings between case managers and persons. In response to these comments, the Department modified the proposed rule to require case managers to specify the frequency of visits in the person's individual service plan. The Department stated that the need for visits varies from person to person. DHS Response, September 27, 1993 at 63. Therefore, the Department contends, there should not be a required number of visits.

Anoka County Human Services stated that the flexible approach under the proposed rule is preferable to the burdensome and intrusive documentation required under the existing rule.

A repeal of a rule must be supported by need and reasonableness. Motor Vehicle Mfg. Ass'n v. State Farm Mutual, 463 U.S. 2977 (1983). The Department has established that it is needed and reasonable to relax the requirements of the current rule. The proposed rule, however, imposes no requirements for frequency of monitoring activities or the sorts of activities which are appropriate during monitoring. The hearing testimony and comments demonstrate that case managers are often out of touch with the persons whose cases they manage. The Department has not demonstrated the need for or reasonableness of eliminating all case manager monitoring requirements. As proposed and modified, the rule leaves the frequency and type of monitoring and evaluation activities entirely up to the discretion of the case manager. Without some minimum

standards, the proposed rule is unreasonable.

The Administrative Law Judge recommends that the Department adopt the following language, versions of which were proposed by several commentators:

> The case manager shall specify the frequency of monitoring and evaluation activities in the person's individual service plan based on the level of need of the person and other factors which might affect the type, amount or frequency of service. The case manager shall conduct a monitoring visit with each person on at least a semiannual basis.

The Administrative Law Judge finds that the language is the minimum needed to make this portion subpart 8 needed and reasonable.

This subpart describes when case manager may initiate problem resolution measures. Problem resolution involves initial conferences with the provider or interdisciplinary team. If the problem continues, the case manager will notify the county board and licensing and certification agencies. The proposed subpart provides that a case manager shall initiate problem resolution measures if:

> ...the provider fails to carry out the provider's responsibilities consistent with the individual service plan or develop an individual program plan when needed, or the case manager is otherwise dissatisfied with the provision of services...

Proposed rule 9525.0024, subp. 8. ARRM objected that the "dissatisfaction" standard is vague. The Department responded that these measures are authorized by statute. DHS Response, September 27, 1993 at 62. The statute provides that the case manager shall initiate problem resolution measures if:

> ...the provider fails to develop or carry out the individual program plan...

Minn. Stat. § 256B.092, subd. 1e(c) (1992). Since the Commissioner is authorized to establish required controls under Minn. Stat. § 256B.092, subd. 6, the Department may require problem resolution measures if the provider fails to comply with the individual service plan. This additional requirement is needed and reasonable.

The "dissatisfaction" standard is entirely different. A rule must provide a standard to guide the administrator. Anderson v. Commissioner of Highways, 126 N.W.2d 778, 780 (Minn. 1964). The "dissatisfaction" standard provides no standard or guidelines to

guide case managers. This language is unreasonable. The Administrative Law Judge finds that the

language "or the case manager is otherwise dissatisfied with the provision of services" must be deleted from this subpart.

Except as described above, this subpart is needed and reasonable in all other respects.

Proposed rule 9525.0028 - Quality Assurance

This rule describes the Department's role in supervising county agencies. RESA and ARRM suggested that the county corrective action plan should be available to the public. The corrective action plan probably is public data under the Minnesota Data Practices Act. Even if the corrective action plan is not public data, the failure of this rule to require that the plan be available to the public does not make the rule unreasonable.

James Campbell, Social Service Supervisor of Mower County Human Services, stated at the hearing and in comments that the evaluation and monitoring activities to be used by the Department were vague. The rule states the Department shall determine whether the county services are designed to produce the outcomes specified in proposed rule 9525.0008 or otherwise comply with the case management rule. Although the rule does not specify the frequency or specific methods of evaluation activities, the rule does provide counties with fair notice of the standards which the Department will use to measure quality assurance. This rule is needed and reasonable.

Proposed rule 9525.0032 - Host County Concurrence

This rule describes the procedure by which two counties may cooperate to provide services. Gray, Plant, Mooty, Mooty & Bennett suggested at the hearing that the requirement of host county concurrence violated federal law. The existing rule contains host county concurrence requirements. Minn. R. 9525.0085, subp. 2(H) (1991 & Supp. 1992). In response to a similar complaint, the Health Care Financing Administration expressed its opinion that Rule 9525.0085, subp. 2(H) did not violate federal law. Letter of Charles W. Hazlett (Attachment #20 to DHS Response, September 27, 1993). The proposed rule is a restatement of the existing rule. The proposed rule incorporates Minn. Stat. § 256B.092, subd. 8a which limits the circumstances in which a county may refuse to concur. The proposed rule further restricts non-concurrence by providing that silence is the same as concurrence. The proposed rule is consistent with federal law and is needed and reasonable.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Minnesota Department of Human Services gave proper notice of this rulemaking hearing.

2. The Department has fulfilled the procedural requirements of Minn. Stat. §§ 14.14, subds. 1, 1a, and 2 (1992) and all other procedural requirements of law or rule so as to allow it to adopt the proposed rules.

3. The Department has demonstrated its statutory authority to adopt the proposed rules and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. § 14.05, subd. 1, Minn. Stat. § 14.15, subd. 3, and Minn. Stat. § 14.50 (i) and (ii).

4. The Department has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. § 14.14, subd. 2 and Minn. Stat. § 14.50 (iii), except as noted at Findings 19, 59, and 60 above.

5. The additions and amendments to the proposed rules which were suggested by DHS after publication of the proposed rules in the State Register do not result in rules which are substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. § 14.15, subd. 3, Minn. Rule 1400.1000, subp. 1, and Minn. Rule 1400.1100.

6. The Administrative Law Judge has suggested actions to correct the defects cited at Conclusions 3 and 4 above as noted at Findings 20, 59 and 60.

7. Due to Conclusions 4 and 6, this Report has been submitted to the Chief Administrative Law Judge for his approval pursuant to Minn. Stat. § 14.15, subd. 3.

8. Any Findings which might properly be termed Conclusions and any Conclusions which might properly be termed Findings are hereby adopted as such.

9. A Finding or Conclusion of need and reasonableness in regard to any particular rule subpart does not preclude and should not discourage the Department from further modifications of the proposed rules based upon an examination of the public comments, provided that no substantial change is made from the proposed rules as originally published, and provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the proposed rules be adopted except where specifically otherwise noted above.

Dated this ____ day of November, 1993.

PHYLLIS REHA
Administrative Law Judge

Reported: Transcript prepared by Christopher J. Hegle
Court Reporter
Ray J. Lerschen & Associates
(one volume)